

ESTTA Tracking number: **ESTTA526341**

Filing date: **03/12/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	N.V.E., Inc.		
Entity	Corporation	Citizenship	New Jersey
Address	15 Whitehall Road Andover, NJ 07821 UNITED STATES		

Attorney information	Brian M. Gaynor Nicoll Davis & Spinella LLP 95 Route 17 South Suite 316 Paramus, NJ 07652 UNITED STATES efiling@ndslaw.com Phone:201-712-1616
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Applicant Information

Application No	85533533	Publication date	02/12/2013
Opposition Filing Date	03/12/2013	Opposition Period Ends	03/14/2013
Applicant	Phytonutritia LLC 37 Midland Avenue Elmwood Park, NJ 07407 UNITED STATES		

Goods/Services Affected by Opposition


Class 005. First Use: 2011/07/06 First Use In Commerce: 2011/07/06 All goods and services in the class are opposed, namely: GELATINIZED DIETARY SUPPLEMENT

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
Dilution	Trademark Act section 43(c)

Mark Cited by Opposer as Basis for Opposition

U.S. Application No.	77089643	Application Date	01/24/2007
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	6 HOUR POWER!		

Design Mark	
Description of Mark	NONE
Goods/Services	Class 032. First use: First Use: 2006/05/29 First Use In Commerce: 2006/05/29 Drinking water containing vitamins or protein; flavored waters; non-alcoholic beverages, namely, sports drinks, energy drinks, drinking water containing protein, fruit drinks; energy shots, namely, energy drinks

Attachments	77089643#TMSN.jpeg (1 page)(bytes) NVE v POWER HOUR Notice of opposition.pdf (4 pages)(84949 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/brian gaynor/
Name	Brian M. Gaynor
Date	03/12/2013

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD**

N.V.E., INC,

Opposer,

v.

PHYTONUTRITIA LLC,

Applicant.

In re Serial No. 85533533

Mark: POWERHOUR and Design

NOTICE OF OPPOSITION

In the matter of trademark Ser. No. 85533533, for POWERHOUR and Design, as a trademark for “gelatinized dietary supplement” in International Class 5, published for opposition on February 12, 2013, and said application owned by Applicant, Phytonutritia LLC (“Phytonutritia”);

N.V.E., Inc., (“NVE”), a New Jersey corporation with an address of 15 Whitehall Road, Andover, New Jersey 07821, believes that it will be damaged by the registration of POWERHOUR and Design, as Phytonutritia’s Mark, and hereby opposes said application pursuant to 15 U.S.C. Sec. 1064 (Trademark Act of 1946, Sec. 14).

The grounds for the opposition are as follows:

1. Opposer manufactures the world-famous energy shot sold under the brand name 6 HOUR POWER. Opposer, through its distributors, distributes and sells Opposer’s energy shot throughout the United States.

2. Since long prior to Applicant’s filing of its application to register the mark POWERHOUR and Design and prior to any use by Applicant, Opposer has used, advertised and

promoted in commerce, and continues to use, advertise and promote in commerce, Opposer's 6 HOUR POWER mark in connection with Opposer's energy shot.

3. Opposer owns extensive common law rights to its 6 HOUR POWER mark. In addition, Opposer owns U.S. Trademark Serial No. 77089643 for 6 HOUR POWER for energy shots, which is currently pending registration on the Principal Register and has not been abandoned.

4. Opposer has expended substantial resources to advertise and promote the above described product, under its 6 HOUR POWER Mark.

5. By reason of Opposer's advertisement, sale, offering for sale, promotion and use, and the world-wide distribution of Opposer's products and services, Opposer's 6 HOUR POWER Mark has come to be recognized as signifying Opposer and its products and services. Opposer has built up extensive goodwill in its 6 HOUR POWER Mark.

6. Long prior to Applicant's filing of its application to register the mark "POWERHOUR and Design" and prior to any use by Applicant, purchasers had come to recognize Opposer's 6 HOUR POWER Mark as identifying goods and services emanating exclusively from Opposer.

7. Opposer's 6 HOUR POWER Mark is famous and has been famous since long prior to Applicant's filing of its application to register the mark "POWERHOUR and Design" and prior to any use by Applicant.

8. Notwithstanding Opposer's prior rights in and to Opposer's 6 HOUR POWER Mark, on February 7, 2012, Applicant filed an application for the mark "POWERHOUR and Design" for "gelatinized dietary supplement" in International Class 5. That application was published for opposition on February 12, 2013 in the Official Gazette (Trademark) of the United States Patent and Trademark Office.

9. Applicant's applied-for goods are similar and related to the products and services with which Opposer uses its 6 HOUR POWER Mark.

10. Applicant's mark "POWERHOUR and Design" is confusingly similar to Opposer's 6 HOUR POWER Mark, and Applicant's use and registration of "POWERHOUR and Design" with the goods set forth in Applicant's application are likely to cause confusion, deception, and/or mistake among the relevant public.

11. Applicant's use and registration of the mark "POWERHOUR and Design" are likely to falsely suggest a connection with Opposer and Opposer's 6 HOUR POWER Mark.

12. Applicant's use and registration of the mark "POWERHOUR and Design" are likely to dilute the distinctiveness of Opposer's famous 6 HOUR POWER Mark.

13. Applicant's use and registration of the mark "POWERHOUR and Design" interferes with Opposer's 6 HOUR POWER Mark and will damage Opposer, its business and its goodwill.

WHEREFORE, Opposer believes that it will be damaged by registration of Applicant's mark and prays that it be denied.

DATED: March 12, 2013

Respectfully submitted,
Attorneys for Applicant

By: /s/ brian gaynor
Anthony J. Davis
Brian M. Gaynor
Nicoll Davis & Spinella LLP
95 Route 17 South
Paramus, New Jersey 07652
Phone: (201) 712-1616
Fax: (201) 712-9444

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Notice of Opposition was forwarded by first class postage pre-paid mail by depositing the same with the U.S. Postal Service on this 13th day of March, 2013 to the attorneys for the Applicant at the following address:

Paul H. Kochanski
Lerner, David, Littenberg, Krumholz & Mentlik, LLP
600 South Ave West, Suite 2
Westfield, New Jersey 07090-1497

DATED: March 13, 2013

/s/ brian gaynor
Brian M. Gaynor